IN THE SUPREME COURT
OF THE STATE OF CALIORNIA

PHYLLIS K. MORRIS, as Public Defender for the County of San Bernardino, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent,	Case No. S246214 Court of Appeal Case no. E066330 Superior Court Case nos.: CIVDS1610302 ACRAS1600028
THE PEOPLE, Real Parties in Interest.	

PETITIONER'S OPENING BRIEF ON THE MERITS

PHYLLIS K. MORRIS
Public Defender
County of San Bernardino
STEPHAN J. WILLMS
State Bar no. 196267
Deputy Public Defender
8303 Haven Avenue, Third Floor
Rancho Cucamonga, CA 91730
Telephone: (909) 476-2206
Facsimile: (909) 466-8748
swillms@pd.sbcounty.gov
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Rules of Court

ISSUE PRESENTED FOR REVIEW

Is an Appellate Division of the Superior Court required to appoint counsel for an indigent defendant charged with a misdemeanor offense on an appeal by the prosecution?

STATEMENT OF THE CASE

California Rules of Court, rule 8.851(a), only authorizes the Appellate Division of a Superior Court to appoint counsel for a criminal defendant who has been convicted of a misdemeanor. Ruth Zapata Lopez was charged with misdemeanor driving under the influence of alcohol in respondent court and was represented by petitioner. Respondent granted a motion to suppress filed by petitioner on behalf of Ms. Lopez (Cal. Pen. Code, § 1538.5)[1] and the case was dismissed. The People appealed the granting of the suppression motion to the Appellate Division of the Superior Court. (Pen. Code, § 1538.5, subd. (j).) Petitioner requested respondent appoint counsel to represent Ms. Lopez in the Appellate Division proceeding. Respondent denied the request because Ms. Lopez had not been convicted of any criminal offense. When she insisted respondent told petitioner she remained appointed to represent Ms. Lopez in the Appellate Division. Petitioner replied that she had elected to not represent Ms. Lopez in the Appellate Division proceeding, and again requested counsel be appointed to represent Ms. Lopez in the Appellate Division. Respondent refused again, this time advising petitioner that she could either represent Ms. Lopez, or petition the Court of Appeal for a writ. Said writ petition was filed, denied, and a petition for review followed. The petition was granted, and this is petitioner's opening brief.

---

[1] All Statutory references are to California statutes.

PROCEDURAL HISTORY

On June 9, 2015, a criminal complaint was filed in respondent court charging Ruth Zapata Lopez with misdemeanor driving under the influence of alcohol. The complaint further alleged Ms. Lopez had a prior conviction. On March 11, 2016, Ms. Lopez' motion to suppress was granted. The case was dismissed on March 14, 2016. The People appealed the granting of the suppression motion to the Appellate Division of the Superior Court.

On May 6, 2016, petitioner asked the Appellate Division to appoint counsel to represent Ms. Lopez in the appellate proceedings. The request was denied. An Appellate Division clerk explained Ms. Lopez was not entitled to appointed counsel because she was not required to file a reply brief, and "because it's a misdemeanor and under $500.00."

On May 11, 2016, petitioner attempted to file a written application for the appointment of counsel for Ms. Lopez in the Appellate Division. A clerk familiar with the case told petitioner Ms. Lopez was not entitled to appointed counsel. After further discussion the clerk left to consult with a supervisor. A supervisor came to the clerk's service window and reiterated the Appellate Division's position that was Ms. Lopez is not entitled to appointed counsel because she had not been convicted of a misdemeanor. The supervisor did agree to file the application for appointment of counsel, but stamped it "Filed on Demand."

On May 24, 2016, petitioner called the Appellate Division clerk to see if a decision had been made regarding the request for appointed counsel for Ms. Lopez. The clerk who answered the phone told petitioner the Appellate Division's legal research staff had concluded Ms. Lopez was not entitled to appointed counsel in the Appellate Division appeal proceedings, and that the court would not issue any order regarding the application for appointment of

counsel. The clerk then advised petitioner she would remain appointed to represent Ms. Lopez, and that it was in fact her duty to do so. Petitioner told the clerk that *Mowrer v. Appellate Dep't.* (1990) 226 Cal.App.3d 264, states that the Public Defender cannot be compelled to represent a former client on appeal. After further conversations with the research unit, the clerk returned and advised petitioner the Appellate Division remained firm in their position that petitioner remained appointed and it was her duty to represent Ms. Lopez in the Appellate Division proceeding. The clerk told petitioner that she could represent Ms. Lopez or petition the Court of Appeal for a writ. The call ended with the clerk reiterating the Appellate Division would not appoint counsel to represent Ms. Lopez, and would not respond to any further requests for the appointment of counsel for Ms. Lopez.

On June 14, 2016, petitioner filed a petition for a writ of mandate in the Court of Appeal, Fourth Appellate District, Division Two, requesting the Court issue a writ directing the Appellate Division to appoint counsel other than the public defender to represent Ms. Lopez. That petition was denied on June 28, 2016, without prejudice so petitioner could file the same petition in the Appellate Division.

On June 29, 2016, petitioner filed a petition for a writ of mandate in the Appellate Division requesting that court to issue a writ directing itself to appoint counsel other than the public defender to represent Ms. Lopez in the Appellate Division. That petition was summarily denied on July 5, 2016.

On July 7, 2016, petitioner refiled a second original petition for a writ of mandate in the Court of Appeal requesting the issuance of a writ directing the Appellate Division to appoint counsel other than the public defender to represent Ms. Lopez. The petition was summarily denied on July 13, 2016.

On July 22, 2016, petitioner filed a petition for review with a request for a stay in this court. Later that day this court issued an order staying the Appellate Division proceedings and invited respondent to file an answer to the petition. Respondent's answer was filed on August 12, 2016. Petitioner filed her reply on August 22, 2016. On September 14, 2016, the petition for review was granted and the matter was remanded back to the Court of Appeal with directions to vacate the order summarily denying the petition for a writ of mandate, and to issue an order to show cause.

On November 21, 2017, the Court of Appeal denied the petition in a published opinion. The court held that rule 8.851 of the California Rules of Court, which only requires an Appellate Division to appoint counsel for an indigent defendant convicted of a misdemeanor offense, does not violate an indigent respondent's right to appointed counsel guaranteed under the Sixth Amendment to the federal Constitution,[2] or her right to equal protection and due process of law guaranteed under the Fourteenth Amendment.[3] The court did not rule on whether the public defender is required to represent indigent respondents in Appellate Division proceedings.

Petitioner filed her second petition for review on January 2, 2018. The petition for review was granted on February 28, 2018, and this is petitioner's opening brief on the merits.

---

[2] "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel." (U.S. Const., 6th Amend.)

[3] "No State...shall...deprive any person of life liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend.)

ARGUMENT

I. Indigent respondents in Appellate Division proceedings have a Sixth and Fourteenth Amendment right to appointed counsel

a. Sixth Amendment

"The Sixth Amendment [right to counsel] guarantees an accused the assistance of counsel not just at trial, but whenever it is necessary to assure a meaningful defense." (*United States ex rel. Thomas v. O'Leary* (1988) 856 F.2d at p. 1014 (*Thomas*), citing *United States v. Wade* (1967) 388 U.S. 218, 225.) Criminal defendants maintain their Sixth Amendment right to counsel at all "critical stages" of the proceedings. (*Thomas, supra,* 856 F.2d at p. 1014 citing and quoting *Wade, supra,* 383 U.S. at pp. 224-226, and *Coleman v. Alabama* (1970) 399 U.S. 1, 7; *Claudio v. Scully* (2nd Cir. 1992) 982 F.2d 798, 802-03.) Critical stages are those "where potential substantial prejudice to [the] defendant's rights inheres in the particular confrontation and where counsel's abilities can help avoid that prejudice." (*Thomas, supra,* 856 F.2d at p. 1014 citing *Coleman, supra,* 399 U.S. at p. 9.) Pretrial proceedings that "might well settle the accused's fate and reduce the trial to a mere formality" are critical stages at which a defendant maintains his Sixth Amendment right to counsel. (*Thomas, supra,* 856 F.2d at p. 1014, citing and quoting *Wade, supra,* 388 U.S. at p. 224, and *Coleman, supra,* 399 U.S. at p. 7.) A pretrial appeal to the granting of a suppression motion is clearly a critical stage of a criminal proceeding at which the defendant has a Sixth Amendment right to counsel. (*Thomas, supra,* 856 F.2d at p. 1014; *Claudio, supra,* 982 F.2d at p. 802; *Commonwealth v. Goewey* (2008) 452 Mass. 399, 402.)

Thomas, Claudio, and *Goewey,* are all squarely on point. In each case the court addressed the exact issue presented in this case;[4] and in each case

[4] The issue came before all three courts differently than it has come before this court. In *Thomas*, *Claudio,* and *Goewey,* there was a prosecution pretrial

the court held a government pretrial appeal to the granting of the suppression motion was a critical stage of the criminal proceeding at which a defendant has a Sixth Amendment right to counsel. (*Thomas, supra,* 856 F.2d at pp. 1014-1015; *Claudio, supra,* 982 F.2d at p. 802; *Goewey, supra,* 452 Mass. at pp. 402-403.)

Thomas, *Claudio,* and *Goewey*, fully explain why the People's pretrial appeal in this matter is a critical stage of the proceedings at which Ms. Lopez maintains her Sixth Amendment right to counsel. There is no doubt that Ms. Lopez' suppression hearing before the trial court was a critical stage at which she was entitled to receive effective assistance of counsel. (*Thomas, supra,* 856 F.2d at p. 1014.) The prosecution was forced to dismiss Ms. Lopez' case after her suppression motion was granted. It is therefore obvious that the outcome of the hearing was crucial to the People's case. If the People prevail on their pretrial appeal, the effect will be the denial of Ms. Lopez' suppression motion, and at that point the People will be able to continue their prosecution. Therefore, the result of the People's pretrial appeal is "no less crucial to [Ms. Lopez] than [the Superior Court] ruling on the suppression motion[]." (*Ibid.*) The prosecution's appeal confronts Ms. Lopez with a new type of adversarial proceeding that requires counsel skilled in persuading the panel of Appellate Division judges by means of brief and oral argument. (*Ibid.*) Following the dismissal of her case, Ms. Lopez now "must face an adversary proceeding that - like a trial - is governed by intricate rules that to a layperson would be

---

appeal to a granting of a suppression motion, but the defendant in each case was represented by counsel at their respective appeal hearings. However, a threshold issue raised in each case was whether each defendant's counsel provided ineffective assistance of counsel at the appeal hearings. Therefore, in each case the court had to first determine whether a defendant had a Sixth Amendment right to counsel at that type of pretrial appeal hearing before determining whether he received ineffective assistance of counsel.

hopelessly forbidding. An unrepresented [respondent,] like an unrepresented defendant at trial - is unable to protect vital interests at stake." (*Ibid* quoting *Evitts v. Lucey* (1985) 469 U.S. 387, 396.) Therefore, the prosecution appeal in this matter is a critical stage of the proceedings at which Ms. Lopez retains her Sixth Amendment right to counsel. (*Thomas, supra,* 856 F.2d at pp. 1014-15; *Claudio, supra,* 982 F.2d at p. 802; *Goewey, supra,* 452 Mass. at pp. 402-03.)

Ross v. Moffitt (1974) 417 U.S. 600, provides additional support for a determination that Ms. Lopez has a Sixth Amendment right to counsel in the Appellate Division proceedings. (*Claudio, supra,* 982 F.2d at p. 802.) In *Ross* the Supreme Court decided not to extend the right to counsel to post-conviction discretionary appeals. (*Ibid.*) In *Ross*, the Court wrote that:

> 'It is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.' (*Ibid* quoting *Ross, supra,* 417 U.S. at pp. 610-611, internal quotation marks original.) [5]

Here, Ms. Lopez needs assistance of counsel during the Appellate Division proceedings as a shield, not a sword, because "the prosecution initiated the appellate process at a time when [her] presumption of innocence remained intact." (*Claudio, supra,* 982 F.2d at p. 803.) Therefore, the prosecution's

[5] "In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless [he is provided counsel]." (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344.)

pretrial appeal is "unquestionably a critical stage" of the proceedings. (*Id.* at p. 802.)

If the prosecution pretrial appeal in this case is allowed to go forward at present it will be "devoid of any advocacy on behalf" of Ms. Lopez. (*Goewey, supra,* 452 Mass. at p. 405.) The proceedings will not, as they should, involve any adversarial process. (*Ibid.*) Unilateral review of the suppression hearing transcript by the Appellate Division without any advocacy on behalf of Ms. Lopez is not an adequate substitute for her Sixth Amendment right to counsel. (*Ibid* citing *Penson v. Ohio* (1988) 488 U.S. 75, 83-85; See also *Douglas v. California* (1962) 372 U.S. 353, 355-356.) The proper procedure here is for the Appellate Division to decide the People's pretrial appeal only after receiving briefing and hearing oral argument from counsel advocating on behalf of Ms. Lopez. (*Goewey, supra,* 452 Mass. at p. 405.)

b. Fourteenth Amendment

'Both equal protection and due process emphasize the central theme of our entire judicial system – all people charged with crime must ... "stand on an equality before the bar of justice in every American court."' (*Griffin v. Ill.* (1956) 351 U.S. 12, 17, quoting *Chambers v. Florida* (1940) 309 U.S. 227, 241.) A state that grants a right of appellate review may not do so in a way that discriminates against individuals who are poor. (*Griffin, supra,* 351 U.S. at p. 18.) This would be "a misfit in a country dedicated to affording equal justice to all." (*Id.* at p. 19.) Indigent defendants must be afforded the same adequate appellate review that is provided to defendants who do have money to pay for representation. (*Ibid*; *Douglas, supra,* 372 U.S. at p. 355.) There is lacking an equality demanded by the Fourteenth Amendment where the rich man enjoys the benefits of counsel "while the indigent man is forced to shift for himself." (*Id.* at p. 358.) The United States Supreme Court has for decades now made it abundantly clear that "differences in access to the

instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." (*Roberts v. La Vallee* (1967) 389 U.S. 40, 42.) There is no distinction between a rule that denies an indigent the right to defend themselves in the trial court, and one denying them the right to defend themselves in an appellate court. (*Griffin, supra,* 351 U.S. at p. 18.)

Ms. Lopez needed to have counsel appointed in the Superior Court to protect herself from the risk of actual imprisonment, and she was appointed counsel as required by the Sixth Amendment. After her suppression motion was granted, Ms. Lopez no longer had a right to appointed counsel because there was no longer a risk of imprisonment. But when the prosecution filed their appeal challenging the granting of the suppression motion, Ms. Lopez was again haled into court, and again faces a risk of actual imprisonment if the prosecution prevails on their appeal. One would think it obvious that Ms. Lopez would have a right to counsel in the Appellate Division because if the prosecution prevails, she will again face a risk of imprisonment if convicted. However, it is at this point that California's procedures take a rather strange turn. As it turns out, under California procedure, Ms. Lopez does not have a right to appointed counsel to represent her during the People's pretrial appeal proceedings, notwithstanding the fact that if the prosecution prevails she will again face imprisonment if convicted. (Cal. Rules of Court, rule 8.851(a).) A system of appellate review that functions in this manner violates an indigent defendant's right to equal protection and due process of law. (*Griffin, supra,* 351 U.S. at p. 18; *Douglas, supra,* 372 U.S. at pp. 357-358.)

The rule 8.851(a) equal protection violation is quite blatant because it creates an appeals process that clearly discriminates between the wealthy and the poor. A defendant, affluent or indigent, has a right to counsel during any Superior Court proceeding. The wealthy defendant may retain counsel, while

an indigent has a Sixth Amendment right to have counsel appointed. That is beyond question. The right to counsel is particularly important in a Superior Court suppression hearing because the outcome of the proceeding will often determine whether or not the prosecution can proceed. (*Thomas, supra,* 856 F.2d at p. 1014; *Claudio, supra,* 982 F.2d at p. 802.) Misdemeanor cases are often dismissed after a suppression motion is granted, and that is exactly what happened in Ms. Lopez' case. And but for the guiding hand of counsel, that would not have happened.

If the prosecution appeals the granting of a suppression motion to the Appellate Division, the defendant is then haled back into court to defend the lower court judgment rendered in her favor. However, in those proceedings, pursuant to rule 8.851(a), indigent defendants have no right to have counsel appointed to assist them in attempting to defend their judgment. Although it is true that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel"[6] there is no diminution in the liberty interest at risk in an Appellate Division proceeding wherein the prosecution challenges the granting of a suppression motion in the Superior Court, as opposed to the liberty interest that was at stake in the Superior Court suppression hearing. If the suppression motion is denied in the Superior Court, the liberty interest at stake is whatever the maximum punishment is for the charged offense. If an appeal is filed after the granting of a suppression motion and the granting of the motion is reversed on appeal, the liberty interest at stake is whatever the maximum punishment is for the charged offense. The liberty interest at risk is the same regardless of whether the defendant loses a motion to suppress in the Superior Court, or has the granting of his suppression motion reversed in the Appellate Division.

---

[6] *Lassiter v. Dept. of Social Services* (1981) 452 U.S. 18, 24.

Rule 8.851(a) creates the type of appeal process that was specifically condemned by the United States Supreme Court in *Griffin* and *Douglas*: An appeal procedure that discriminates between the wealthy and the poor. After a pretrial appeal challenging the granting of a suppression motion has been filed by the government, the situation facing a wealthy or indigent defendant, who in these cases is the respondent, is the same. If the government appeal is successful, the defendant's case will be resurrected in the Superior Court and will proceed in the manner it would have if the suppression motion had not been granted. That will occur whether a defendant is wealthy or indigent. In the Superior Court, these two classes of defendants, whose situations are indistinguishable, are treated the same; but in the Appellate Division they are not. In the Superior Court the indigent defendant is appointed counsel so she can defend herself just as effectively as a wealthy defendant who can pay for counsel. But in the Appellate Division, the indigent defendant does not have the right to have counsel appointed, even though her situation in that court is indistinguishable from a wealthy defendant who can afford to retain counsel. In other words, the kind of review a defendant/respondent will receive in an Appellate Division proceeding will depend on whether he can afford to retain counsel,[7] but the Supreme Court has made it abundantly clear that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate as defendants who have money...." (*Griffin, supra,* 351 U.S. at p. 19.) The resultant discrimination here is "between cases where a rich man can require the court to listen to argument of counsel before deciding on the merits, but

[7] Respondents are not the only party seeking appellate relief in Ms. Lopez' case. Ms. Lopez has again been haled into court, so she is seeking appellate relief as well now that she is there. The appellate relief Ms. Lopez is seeking is the affirmance of the Superior Court judgment dismissing her case.

a poor man cannot." (*Douglas, supra,* 372 U.S. at p. 357.) In this matter, Ms. Lopez, who cannot afford to retain appellate counsel, is left to hope that the Appellate Division judges' independent review of the suppression record in her case will reveal enough to overcome the briefing and argument presented by learned counsel representing the People: "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." (*Id.* at p. 358.)[8] California "is not free to produce such a squalid discrimination." (*Griffin, supra*, 351 U.S. at p 24, conc. opn. of Frankfurter, J.) Clearly, Rule 8.851(a) of the California Rules of Court violates an indigent respondent's right to equal protection and due process of law. (U.S. Const., 14th Amend.; *Griffin, supra*, 351 U.S. at pp. 17-18; *Douglas, supra,* 372 U.S. at pp. 356-357.)

II. Authority discussed by the Court of Appeal

a. *Martinez v. Court of Appeal*

Relying heavily on *Martinez v. Court of Appeal* (2000) 528 U.S. 152, the Court of Appeal held Ms. Lopez does not have a Sixth Amendment right to appointed counsel in the Appellate Division of the Superior Court because the Sixth Amendment does not apply to appellate court proceedings. (*Morris v. Superior Court* (2017) 17 Cal.App.4th 636, 645.) *Martinez* has nothing to do with the Sixth Amendment issues in this case. In *Martinez*, the defendant was convicted and asked that he be permitted to represent himself on appeal. The Supreme Court affirmed the denial of that request because "[t]he Sixth Amendment does not include any right to appeal." (*Martinez, supra,* 528 U.S. at pp. 159-160.) *Martinez* has no bearing on the issues presented in this

[8] Even the Court of Appeal concedes Ms. Lopez "fare better with an attorney then without one." (*Morris v. Superior Court* (2017) 17 Cal.App.4th 636, 640.) "Again, we take no issue with the idea that Lopez' [] brief, and perhaps her chance of an affirmance on appeal, might well be better if she had counsel than if she did not." (*Id.* at p. 647.)

case because this case does not involve an appeal by a convicted defendant. The appellant in this case is the government, not Ms. Lopez. Ms. Lopez was not convicted of anything, and did not file an appeal. The issue in this matter is whether a government pretrial appeal is a critical stage of the proceedings, an issue the *Martinez* did not address. As discussed ante, at page 10, *United States ex rel Thomas, supra,* 856 F.2d 1011, *Claudio, supra,* 982 F.2d 798, and *Goewey, supra,* 452 Mass. 399, all of which rely on longstanding United States Supreme Court case precedent, are all squarely on point and hold that a prosecution pretrial appeal to a trial court granting a motion to suppress is a critical stage of the proceedings wherein a defendant/respondent maintains her Sixth and Fourteenth Amendment right to counsel.

b. *United States ex rel. Thomas v. O'Leary, Claudio v. Scully,* and *Commonwealth v. Goewey*

i. *Thomas, Claudio* (including discussions re *Lassiter v. Dept. of Social Services* and *Scott v. Illinois*)

The attempts by the Court of Appeal to distinguish *Thomas, Claudio,* and *Goewey* are easily dismissed. Regarding *Thomas* and *Claudio,* the Court states each is "easily distinguishable, as they involve murder charges rather than misdemeanor charges. ..." (*Morris, supra,* 17 Cal.App.5th at p. 653.) The distinction is irrelevant. The Court of Appeal itself pointed out in their opinion "the United States Supreme Court has repeatedly held that a risk of actual imprisonment marks the line at which counsel must be appointed for purposes of the Sixth Amendment." (*Id.* at p. 646.) Immediately following this statement the Court cites *Argersinger v. Hamlin* (1971) 407 U.S. 25. In *Argersinger* the defendant was charged with a misdemeanor which exposed him to a six-month sentence. (*Id.* at 26.) He was tried before a judge without counsel, convicted, and sentenced to ninety days. (*Ibid.*) Regarding the Sixth Amendment right to counsel, and the nature of the offense, our High Court stated:

> "The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person than when a person can be sent off for six months or more."

The Supreme Court reversed the conviction and held that "absent a knowing and intelligent waiver [of the right to counsel], no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or a felony, unless he was represented by counsel at trial." (*Id.* at p. 37.)[9] Based on the plain language of *Argersinger*, there can be no doubt that the outcome of *Thomas* and *Claudio* would have been the same regardless of whether the defendants had been charged with murder or a misdemeanor (that would have subjected them to actual imprisonment). Both cases remain squarely on point with the facts of this case.

Lassiter

The Court of Appeal also states that *Thomas* and *Claudio* were easily distinguished because the defendants in each case were "actually sentenced" to prison. (*Morris, supra,* 17 Cal.App.5th at p. 653.) The Court explains this statement earlier in the opinion wherein they state Supreme Court precedent requires "actual imprisonment as a direct consequence of losing the action before the right to counsel must attach." (*Id.* at pp. 647, 649.) According to the Court of Appeal, a criminal defendant does not have a right to appointed counsel until after he has been convicted and then sentenced to serve a term of imprisonment. (*Id.* at p. 649.) The Court of Appeal's obviously erroneous

---

[9] In reaching this decision the Supreme Court adopted the view of the Oregon Supreme Court. (*Argersinger, supra,* 407 U.S. at p. 37.) Here, petitioner is asking this Court to adopt the views of the Massachusetts Supreme Court in *Goewey, supra,* 452 Mass. 399, as well as that of the federal Seventh Circuit Court of Appeals in *Thomas*, and the federal Second Circuit in *Claudio*.

conclusion is the result of their own misreading of *Lassiter, supra,* 452 U.S. 18. In *Lassiter* the Supreme Court held that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of physical liberty." (*Id.* at pp. 26-27.) In this case, the Court of Appeal read "*if* he loses" to mean "*when* he loses" and "*may* be deprived" to mean "*is* deprived." This erroneous word substitution lead to the Court of Appeal reading *Lassiter* as stating that "an indigent litigant has a right to appointed counsel only when, *when* he loses, he *is* deprived of his physical liberty." Read this way, which is an obviously incorrect reading of what is plainly stated, *Lassiter* states an indigent litigant's right to counsel attaches only after he has been convicted and sentenced to a term of imprisonment. If that is what the Supreme Court actually meant, then *Lassiter* effectively overruled numerous other Supreme Court cases which hold the federal constitutional right to counsel in criminal cases commences long before a defendant is convicted. (*Lee v. United States* (2017) 137 S. Ct. 1958, 1964 [Entry of guilty plea.]; *Missouri v. Frye* (2012) 566 U.S. 134, 140 [Arraignment, postindictment interrogations and lineups, entry of a guilty plea.]; *Lafler v. Cooper* (2012) 566 U.S. 156, 165 [All pre-trial critical stages.]; *Coleman v. Alabama* (1970) 399 U.S. 1, [Preliminary hearings.].) *Wade, supra,* 388 U.S. at p. 225 [Arraignment to trial.]; *Mempa v. Rhay* (1967) 389 U.S. 128, 134 [Sentencing.] *Powell v. Alabama* (1932) 287 U.S. 45, 57, 69, [From arraignment to trial.].) To say that *Lassiter* overruled *Lee, Frye,* and *Cooper,* is an entertaining proposition considering the fact that *Lee, Frye,* and *Cooper,* were all decided more than thirty years after *Lassiter.*[10] *Lee, Frye,* and *Cooper,* each reaffirm what is really plainly stated in *Lassiter*, and that is as soon as a defendant is charged with any criminal

[10] And there are many more post-1981 Supreme Court cases (*Lassiter* was decided in 1981) that restate the Sixth Amendment principles reaffirmed in *Lee, Frye,* and *Cooper.*

offense for which she can be imprisoned, she then has a Sixth and Fourteenth Amendment right to counsel at all critical pretrial stages of the proceedings. The holding by the Court of Appeal in this case that *Lassiter* actually held a defendant's right to appointed counsel does not attach until after he has been convicted and sentenced to a term of imprisonment is obviously wrong.[11]

Scott

The defendant in *Scott v. Illinois* (1978) 440 U.S. 367, was convicted of shoplifting merchandise valued at less than $150. The defendant was tried before a judge without counsel, convicted of the offense, and fined $50. The maximum penalty for this offense was a $500 fine, and/or a year in jail. (*Id.* at p. 368.) Relying on *Argersinger, supra,* 407 U.S.25, the Illinois Supreme Court held there was no Sixth and Fourteenth Amendment right to counsel for defendants charged with offenses for which imprisonment is authorized but not imposed. (*Scott, supra,* 440 U.S. at p. 369.) The U.S. Supreme Court affirmed both the reasoning and judgment of the Supreme Court of Illinois. (*Ibid.*)

The rule the Court of Appeal derives from *Scott, supra,* 440 U.S. 367, is the Sixth and Fourteenth Amendment require 'actual imprisonment as a

---

[11] The Court of Appeal's interpretation of *Lassiter* also means a trial court's refusal to appoint counsel at any pretrial critical stage, and trial, could not be challenged by a pretrial writ because a defendant's right to counsel does not attach until he has been convicted and sentenced to a term of imprisonment. Under the Court of Appeal holding, a defendant can only challenge a court's refusal to appoint counsel on direct appeal because the defendant's claim that he was denied his right to counsel is not ripe for adjudication until after he has been convicted and sentenced. That is clearly wrong because it is well-settled that a trial court order concerning a designation of appointed counsel is subject to review by a writ of mandate. (*Drumgo v. Superior Court* (1973) 8 Cal.3d 890, 933 ["Mandate is a proper remedy when the trial court does not properly appoint or substitute counsel."]; *Smith v. Superior Court* (1968) 68 Cal.2d 547, 558 [If a court order violates a defendant's right to counsel, "mandate will lie to rectify the error before a constitutionally defective trial is undertaken."].) If *Morris* is affirmed, *Drumgo* and *Smith* are overruled.

direct consequence of losing the action before the right to appointed counsel must "attach."' (*Morris, supra,* 17 Cal.App.5th at p. 647, citing *Scott, supra,* 440 U.S. at pp. 373-374, internal quotation marks added.) The word "attach" has been emphasized because that word does not actually appear anywhere in either the *Scott* or *Argersinger* opinions. Just as it did with *Lassiter, supra,* 452 U.S. 18, the Court of Appeal added a word to the holding in *Scott*, which in turn dramatically changed the holding of the cases. For the same reasons set forth in the *Lassiter* discussion, *ante,* the Court of Appeal's interpretation of the holding in *Scott* is obviously incorrect: *Scott*, decided in 1978, did not overrule *Coleman, supra,* 399 U.S. 1, *Mempa, supra,* 389 U.S. 128, and/or *Wade, supra,* 388 U.S. 218, and could not have overruled *Lee, supra,* 137 S. Ct. 1958, *Frye, supra,* 566 U.S. 134, and *Cooper, supra,* 566 U.S. 156.

The limited rule of law established by the *Argersinger* and *Scott* cases is that post-conviction claims alleging violations of the Sixth and Fourteenth Amendment right to appointed counsel will be rejected if the defendant was not sentenced to a term of imprisonment, even though term of imprisonment could have been imposed. Neither *Argersinger* nor *Scott* addressed when the Sixth or Fourteenth Amendment right to counsel attaches. Neither case held that the right to counsel does not attach prior to, or during, trial. *Argersinger* and *Scott* are both harmless error cases. These cases only hold that the denial of the right to counsel at trial is harmless if imprisonment was not imposed following conviction. It is true that under *Argersinger* and *Scott*, neither the Sixth nor the Fourteenth Amendment require a trial court to appoint counsel for an indigent defendant at any stage of a criminal proceeding, including a trial. However, trial courts just need to be aware that if an indigent defendant for whom counsel is not appointed is convicted, under *Argersinger* and *Scott* that defendant cannot be sentenced to any term of imprisonment; and if the uncounseled defendant is placed on probation, he or she cannot be sentenced

to a term of imprisonment for any probation violations. (*Alabama v. Shelton* (2002) 535 U.S. 654.)

The critical difference between this matter and *Argersinger* and *Scott* is that this case involves a pre-conviction claim, not a post-conviction claim. The *Argersinger/Scott* harmless error test does not apply in this case because Ms. Lopez is not challenging a denial of the right to counsel after conviction. Ms. Lopez has not been to trial, and even though the trial court has dismissed her case, it will be resurrected and headed towards trial if the People prevail on their pretrial appeal. Because both are post-conviction cases, *Argersinger* and *Scott* simply have no bearing on the Sixth and Fourteenth Amendment right to counsel issues presented in this case.

ii. *Goewey*

The Court of Appeal summarily dismissed *Goewey, supra,* 452 Mass. 399, as being superficial because the most the *Goewey* court supposedly had to offer regarding 'why counsel must be afforded to pretrial respondents on appeal if counsel is afforded to pretrial appellants on appeal is that "the same general principles apply" to appellants and respondents on appeal.' (*Morris, supra,* 17 Cal.App.5th at p. 653, citing *Goewey, supra,* 452 Mass. at p. 403.) That is a gross oversimplification. The *Goewey* court's analysis on this issue is quite extensive, and stemmed from the court requesting the parties to brief "the significance of the Appeals Court deciding the case without a brief from the defendant." (*Id.* at p. 401.) After receiving the supplemental briefing, the *Goewey* court begins its analysis by stating "[t]he defendant was entitled to the assistance of counsel in defense of the Commonwealth appeal [and the] [t]he Commonwealth does not dispute this." (*Id.* at p. 402.) The claim by the Commonwealth that the court ends up addressing was that the defendant did not need an attorney to defend himself against the Commonwealth's appeal because the Court of Appeal reviewed the suppression record on its own and determined the Commonwealth would have prevailed regardless of whether

the defendant was represented by counsel. (*Ibid.*) After analyzing one of its own state cases addressing the right to counsel on a direct appeal where the defendant appeals a conviction (*Commonwealth v. Frank* (1997) 425 Mass. 182) the *Goewey* court stated the following (which includes the one sentence snippet cited by the Court of Appeal in this matter):

> "One difference between this case and *Commonwealth v. Frank, supra*, is that this case does not involve a direct appeal by the defendant; rather, it concerns the defendant's participation as an appellee in the Commonwealth's appeal from an interlocutory order suppressing evidence. [Citation.] Nevertheless, the same general principles apply. The defendant was absolutely entitled to be heard in the Commonwealth's appeal, and was entitled to receive effective assistance of counsel toward that end, no less than in any direct appeal he might pursue after a conviction. And, as in *Commonwealth v. Frank, supra*, the defendant, because of his counsel's inaction, was effectively deprived of the assistance of counsel altogether. We are persuaded by the analysis in *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1014-15 (7th Cir. 1988), which applied the rationale of *Evitts v. Lucey, supra*, [469 U.S. 387] and other Supreme Court right-to-counsel decisions to the situation we have here -- a government appeal from a trial court suppression ruling decided by the appellate court without any brief or argument by counsel for the defendant -- and concluded relief was required without any need for a showing the defendant was prejudiced by the absence of counsel. See *Fields v. Bagley*, 275 F.3d 478, 485 (6th Cir. 2001)."[12] (*Goewey, supra,* 452 Mass. at pp. 402-403.)

[12] *Bagley* is yet another federal circuit case that held a defendant/respondent has a Sixth Amendment right to counsel during a government appeal to the granting of a suppression motion.

After distinguishing a Massachusetts case relied on by the Commonwealth (*Commonwealth v. Kegler* (2006) 65 Mass.App.Ct. 907), the *Goewey* court concluded:

> "In sum, in this case the hearing and decision of the Commonwealth's interlocutory appeal was devoid of any advocacy on behalf of the defendant. It was not, as it should have been, an adversary process. The Appeals Court's unilateral review of the [suppression hearing] transcript, perhaps influenced by the Commonwealth's presentation but obviously unaided by any advocacy for the defense, was not an adequate substitute for the defendant's right to the effective assistance of counsel. See *Penson v. Ohio*, 488 U.S. 75, 83-85, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). Nor was it proper for the court to determine unilaterally, again without the benefit of a brief or argument from the defendant, that the defendant was not prejudiced by the absence of counsel. *Id.* at 85-87. The correct course in these circumstances would have been to decide the appeal only after hearing from the defense --" (*Goewey, supra,* 452 Mass. at p. 405.)

In the present case, the Court of Appeal held Ms. Lopez is not entitled to counsel in the Appellate Division because there is a presumption the trial judgment rendered in her favor was correct and the Appellate Division, on its own, will protect her interests. (*Morris, supra,* 17 Cal.App.5th at pp. 651-652.) Ironically, the Court of Appeal cites *Douglas v. California* to support its holding. This is ironic because *Douglas* specifically held that an appellate court's ex parte determination counsel need not be appointed to represent an indigent in an appeal proceeding based on its own examination of the record violates both the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. (*Douglas, supra,* 372 U.S. at pp. 355-356.) The Supreme Court reaffirmed this constitutional rule of law in both *Evitts supra,* 469 U.S. at p. 396, fn. 6, and *Penson, supra,* 488 U.S.

at p. 85.[13] Again, to affirm the Court of Appeal, is to affirm their rejection of *Douglas, Evitts* and *Penson,* which is something a state appeals court cannot do. *Goewey, supra,* 452 Mass. 399, on the other hand, followed *Douglas, Evitts,* and *Penson,* and in so doing reached the conclusion that is consistent with the precedent set forth in those cases, which is indigent respondents in appellate proceedings initiated by the government have a constitutional right to have counsel appointed to assist them in defending lower court judgments rendered in their favor. Clearly, the rationale and holding in *Goewey* should

---

[13] The Court of Appeal also holds there is no denial of any constitutional right to counsel here because "the record fails to support the suggestion that Lopez will be unable to file a brief at all, such that the Appellate Division will decide the People's appeal based on its review of the superior court record...alone." (*Morris, supra,* 17 Cal.App.5th at p. 652, internal quotations marks omitted.) Relying on *Jara v. Municipal Court* (1978) 21 Cal. 3d 181, 184, a case which deals with the appointment of counsel for indigent and incarcerated litigants in civil cases, and has no bearing on criminal cases involving a constitutional right to counsel, the Court of Appeal holds Ms. Lopez can just get help from family, friends, neighbors, or private aid organizations that assist immigrants, in putting together a brief to file in the Appellate Division. According to the Court of Appeal, as long as Ms. Lopez can get someone to help her put something together and file it, then she is covered. This premise is soundly refuted by Supreme Court authority. For example, in *Halbert v. Michigan* (2005) 545 U.S. 605, 617, the Supreme Court recognized "indigent defendants pursuing [relief in appeals courts] are generally ill equipped to represent themselves." In fact, *Halbert* goes on and explains at great length why indigent defendants such as Ms. Lopez need the guiding hand of counsel to assist them in appeal proceedings. (*Id.* at pp. 617-623.) Ironically, again, the Court of Appeal itself cites similar Supreme Court Authority that refutes its own holding. (*Morris, supra,* 17 Cal.4th at p. 644 citing and quoting *Johnson v. Zerbst* (1938) 304 U.S. 458, 462-463.) If Ms. Lopez is ill-equipped to represent herself in an appeal proceeding then, a fortiori, neither are her family, friends, neighbors, or any private aid organizations that assist immigrants (assuming, of course, none are competent criminal defense attorneys). The Court of Appeal holding that there is no violation of a constitutional right to counsel here because Ms. Lopez can just get someone who reads and writes English to help her put her brief together and file it should be easily rejected.

be followed, while the judgment of the Court of Appeal in this matter should be rejected.

c. *Ross v. Moffit*

The Court of Appeal cites a few sentences from *Ross, supra,* 417 U.S. 600, to support their holding the procedures at issue here do not violate the due process clause. (*Id.* at p. 648.) However, the sentences cited only address the limits of the due process right to counsel for appellants. Sandwiched in between the sentences cited by the Court is language differentiating between the interests of appellants and respondents, but the Court of Appeal skipped over it:

> 'it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.' (*Claudio v. Scully, supra,* 982 F.2d at pp. 802-803 quoting *Ross, supra,* 417 U.S. at pp. 610-611, internal quotation marks original.)

This is the identical differentiating language *Claudio, supra,* 982 F.2d 798, relied on in concluding a state pretrial appeal to the granting of a suppression motion is a critical stage of the proceedings, and one in which the respondent maintains a Sixth Amendment right to counsel. Without citing *Ross, supra,* 417 U.S. 600, the *Goewey* court reached the idenitcal conclusion: "This case does not involve a direct appeal by the defendant; rather, it concerns [his] participation as an appellee in [a prosecution] appeal from an interlocutory order suppressing evidence." (*Goewey, supra,* 452 Mass. at p. 402.) Rather than address the analysis and conclusions reached by *Claudio* and *Goewey*, the Court of Appeal instead chose to simply ignore them.

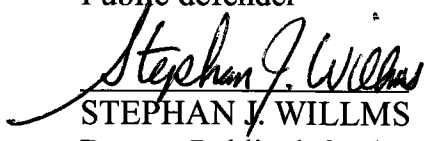
CONCLUSION

A prosecution pretrial appeal to the Appellate Division of the Superior Court challenging the granting of a suppression motion in the trial court is a critical stage of a criminal proceeding at which an indigent respondent has a right to appointed counsel under the Sixth and Fourteenth Amendment to the federal Constitution. A system of appellate procedure that does not permit an Appellate Division court to appoint counsel for indigent respondents in these critical pretrial proceedings, and only allows the respondent to be represented by counsel if he can afford to retain counsel, is one that creates the invidious type of discrimination between the wealthy and the poor that is prohibited by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the federal Constitution. For the reasons set forth herein, Rule 8.851(a) of the California Rules of Court violates the Sixth and Fourteenth Amendments to the federal Constitution. The decision of the Court of Appeal should be reversed.

Dated: March 27, 2018

Respectfully submitted,

PHYLLIS K. MORRIS
Public defender



STEPHAN J. WILLMS
Deputy Public defender

CERTIFICATION UNDER RULE 8.204(c)(1)

I, Stephan J. Willms, declare that I am an attorney duly licensed and admitted to practice law before all courts in the State of California and am a Deputy Public defender for the County of San Bernardino.

According to the word count on the program utilized to prepare this petition, Microsoft Word, the word count is 7,536.

I declare under penalty of perjury the foregoing is true and correct.

Dated: March 27, 2018

Stephan J. Willms
Deputy Public defender

DECLARATION OF SERVICE BY U.S. MAIL

Case: *Morris v. The Superior Court; The People*

Case no.: S246214

Stephan J. Willms declares as follows:

I am a resident of the State of California and over the age of eighteen years; I am not a party to this action; my business address is 9411 Haven Avenue, Rancho Cucamonga, CA 91730; and my mailing address is 8303 Haven Avenue, Third Floor, Rancho Cucamonga, CA 91730. I am familiar with the business practice of the San Bernardino County Public Defender for collection and processing of correspondence for mailing in the United States Postal System. In accordance with this practice, all correspondence placed in the internal mail collection system at the San Bernardino County Public Defender's Office is deposited with the United States Postal System that same day, or the following day, in the ordinary course of business.

On March 27, 2018, I served copies of the

PETITIONER'S OPENING BRIEF ON THE MERITS

by placing a copy in a sealed envelope, in the internal mail collection system at the San Bernardino County Public Defender's Office located at 9411 Haven Avenue, Rancho Cucamonga, CA 91730, and addressed to:

Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

Robert Laurens Driessen
Superior Court of California
247 W. 3rd St.
San Bernardino, CA 92415

Court of Appeal
Fourth District, Division Two
3389 Twelfth Street
Riverside, CA 92101

I declare under penalty of perjury the foregoing is true and correct.

Dated: March 27, 2018

Stephan J. Willms
Deputy Public Defender